# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1950

## No.

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WHEATON BRASS WORKS, PETITIONER,

*vs.*

SOUTHERN PACIFIC COMPANY

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ON PETITION FOR A WRIT OF CERTIORAI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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INDEX


| | Original | Print |
|---|---|---|
| Proceedings in the Supreme Court of the State of New Jersey | 1 | 1 |
| Order of certification | 1 | 1 |
| Appendix to appellant's brief | 2-l | 2 |
| Agreed statement in lieu of record | 2-l | 2 |
| Stipulation of facts | 2-n | 3 |
| Opinion letter of the Essex County District Court | 2-r | 6 |
| Notice of appeal | 2-t | 7 |
| Uniform straight bill of lading | 2-v | 8 |
| Opinion, Burling, J. | 4 | 11 |
| Check list | 15 | 19 |
| Mandate on reversal | 16 | 20 |
| Clerk's certificate (omitted in printing) | 17 | |
| Stipulation as to record | 18 | 21 |



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[fols. 1-2k]

**SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1950**

No. 666

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a Corporation of the State of New Jersey, Defendant-Respondent

ORDER OF CERTIFICATION—Filed November 16, 1950

Pursuant to Rule 1:5-1 it is ordered that the appeal from the judgment entered in this cause on March 10, 1950, in the Essex County District Court, now pending in the Superior Court, Appellate Division, be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

Order that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

Ordered that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the issuing of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

Dated November 16, 1950.

By the Court, Arthur T. Vanderbilt, Chief Justice.

[File endorsement omitted.]

[fol. 2l]

## Appendix to Appellant's Brief

AGREED STATEMENT IN LIEU OF RECORD.

Richard F. Green, attorney for Southern Pacific Company, plaintiff-appellant, and Roy C. Collins, attorney for Wheaton Brass Works, defendant-respondent hereby agree that the following statement shall be presented to and used by the Court in lieu of record on appeal, pursuant to Rule 1:2-22:

1. This is a civil action instituted in the Essex County District Court to recover transportation charges on a certain railroad shipment, the facts as between the parties prior to suit being more fully set forth in a certain Stipulation of Facts, copy of which is annexed hereto, and the original of which was presented to the Judge of the Essex County District Court for use by him in lieu of the submission of evidence by the testimony of witnesses.

2. The action was started on June 16, 1949.

3. In the proceedings in the Essex County District Court, neither party adduced evidence in addition to that set forth in the stipulation of facts, and the matter was presented and disposed of on the basis of cross motions for judgment on the facts set forth and agreed to in said stipulation, after argument and the submission of briefs.

4. The aforesaid stipulation of facts is annexed hereto and made a part hereof.

5. On March 3, 1950 Hon. Joseph G. Lyons advised counsel of his determination favor of the defendant Wheaton Brass Works, by letter, copy of which is annexed hereto and made a part hereof.

[fol. 2m] 6. Judgment was actually entered in the Essex County District Court in favor of the defendant and against the plaintiff on March 10, 1950.

7. The point relied on by the plaintiff-appellant herein is that under the law applicable to the stipulated facts the plaintiff-appellant was and is entitled to judgment against the defendant-respondent.

8. Defendant-respondent hereby waives the filing by the plaintiff-appellant of deposit for costs under Rule 1:2-15.

Richard F. Green, Attorney for Plaintiff-Appellant.
Roy C. Collins, Attorney for Defendant-Respondent.

The foregoing Agreed Statement in lieu of record, is hereby approved this 1st day of May, 1950.

Joseph G. Lyons, Judge, Essex County District Court.

[fol. 2n] STIPULATION OF FACTS

It is hereby stipulated and agreed by and between Richard F. Green, Esq., Attorney of the plaintiff, and Roy C. Collins, Esq., Attorney of the defendant, that the above entitled cause be submitted to the court for its determination without a jury on the following statement of facts:

1. On or about June 1, 1947, the Officer in Charge, Construction Battalion Center, Port Hueneme, California, as agent for Bernard Pipe Supply delivered to plaintiff's agent at Oxnard, California, for transportation to defendant at Newark, New Jersey, certain property described in the bill of lading as "291 BXS Pipe Fittings, NOIBN, I/S". The said agent collected prepaid charges of $1,082.42 on the basis of the applicable tariffs and schedules of the Interstate Commerce Commission.

2. The abbreviation "I/S" is accepted among carriers as meaning "Iron and Steel", but this fact was not known to defendant when it accepted delivery of said property.

3. The defendant knew that the shipment consisted partly of brass but did not know at the time of acceptance of delivery of said shipment that the bill of lading incorrectly described the shipment for rate classification or other purposes.

4. In fact the said shipment was determined by the Pennsylvania Railroad Co., the carrier at destination, to consist of iron and steel pipe with fittings and brass valves; on the basis of the tariffs and schedules applicable to such merchandise the Pennsylvania Railroad Co. charged against plaintiff railroad an additional sum of $716.86 for freight and $21.51 for taxes or a total of $738.37.

[fol. 2o] 5. On May 16, 1947 the defendant entered into a contract of sale with Bernard Pipe Supply of Los Angeles, California, to purchase 291 boxes of loading assemblies, being the property described in paragraphs 1 and 2 of this stipulation.

6. By the terms of its contract of sale said loading assemblies were to be delivered to defendant at Newark, New

Jersey, shipping charges prepaid by the seller, Bernard Pipe Supply.

7. Prior to the arrival of the goods in Newark, New Jersey, the defendant received in the mail from the seller in California an invoice for the purchase price of the goods at the contract price and indicating thereon that the goods had been shipped f. o. b. Newark, New Jersey, with shipping charges prepaid by the seller.

8. Enclosed with the invoice was a uniform straight bill of lading, copy of which is annexed, indicating that freight charges were to be collected.

9. Shortly thereafter defendant received an arrival notice from the Pennsylvania Railroad Co. indicating that the goods had arrived at its freight station in Newark and could be picked up there. Said arrival notice also indicated that freight charges had been prepaid.

10. Because of the inconsistent statements on the sellers invoice and the Pennsylvania Railroad Company's arrival notice as compared with the bill of lading, defendant before accepting delivery of the goods or paying the shipper for the same, communicated with the Pennsylvania Railroad Co. and inquired concerning shipping charges explaining that by its contract with the shipper the latter was to pay shipping charges; that the shipper's invoice indicated shipping charges had been paid in full; that the Pennsyl-
[fol. 2p] vania Railroad Co.'s arrival notice also indicated that shipping charges had been paid in full; that the bill of lading issued by the Plaintiff indicated that shipping charges were to be collected; that by reason of its contract with the seller it did not wish to accept delivery of the goods or pay the seller for the same until it knew whether there were any shipping charges payable.

11. The Pennsylvania Railroad Co. informed defendant that shipping charges had been prepaid in full.

12. In reliance upon this representation by the Pennsylvania Railroad Co. defendant accepted delivery of the goods on June 17, 1947 from the Pennsylvania Railroad Co. and paid the shipper, Bernard Pipe Supply of Los Angeles, California, the full contract price therefor.

13. In December of 1948 or January of 1949 a representative of the Pennsylvania Railroad Co. called on defendant and inquired concerning the nature of this shipment and for a description of the property included therein.

14. Defendant described said merchandise to said representative who thereupon informed defendant that the goods had been improperly classified by the shipper, as a result of which there were additional freight charges due and payable.

15. Whereupon defendant informed said representative that by the terms of its contract with the shipper it was the shipper and not it who was liable for freight charges, exhibiting its contract with the shipper to said representative in substantiation of its contention and informing said representative that any unpaid freight charges would have to be collected by his company from the shipper.

[fol. 2q] 16. Thereupon said representative left defendant's place of business without further demand.

17. Except as set forth in paragraph 14, the plaintiff and the Pennsylvania Railroad Co. had never at any time made any claim or demand on defendant for payment of shipping charges or any portion thereof in connection with said shipment until the filing of the complaint herein.

18. Defendant had no knowledge until served with the complaint herein of the amount of shipping charges paid by the shipper.

19. Defendant had accepted delivery of said goods, had paid the shipper in full therefor and had resold substantially all of said goods before it was informed by the representative of the Pennsylvania Railroad Co. as set forth in paragraph 14 hereof that there was any claim or demand for additional shipping charges.

20. The shipper, Bernard Pipe Supply, is now and was on the date of the commencement of this suit in business in Los Angeles, California, and is solvent.

21. Plaintiff has made no effort to collect the shipping charges, referred to in paragraph 4 hereof, from the shipper, Bernard Pipe Supply.

22. The parties, respectively, reserve the right to adduce any additional evidence, not inconsistent herewith, and further reserve the right to move for judgment on the basis of the facts herein set forth.

Richard F. Green, Attorney for Plaintiff. Roy C. Collins, Attorney for Defendant.

[fol. 2r] THE ESSEX COUNTY DISTRICT COURT

OPINION LETTER—March 3, 1950

GENTLEMEN:

This matter was submitted to the Court for decision on an agreed state of facts and briefs.

After a consideration of the facts and briefs of counsel, the Court cannot find that the consignee herein, the defendant, either factually or legally is primarily or secondarily liable. It seems to the Court that the case at bar is governed by the principles enunciated by Mr. Justice Brandeis in the case of Louisville and Nashville R. R. Co. vs. Central Iron and Coal Co., 265 U. S. 59, wherein he held that the tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract subject to the rule which prohibits discrimination. He held, further, that to ascertain what contract was entered into we look primarily to the bill of lading.

From the stipulated facts it is apparent that the consignee did not promise either expressedly or by implication to pay these freight charges. As a matter of fact, it refused to pay them and inquired what the correct amount was before accepting the shipment.

Counsel for the plaintiff states, in his memorandum, if a consignee accepts a shipment he becomes liable as a matter of law for the full amount of the freight charges and cites in support of this contention, Pittsburgh vs. Fink, 250 U. S., 577, Louisville vs. Central Iron and Coal Co., *supra*, and Louisville vs. U. S., 267, U. S., 395. None of these cases [fol. 2s] in the Court's opinion stands for the bold assertion which counsel makes.

In the Fink case the consignee was to pay for the shipment and did pay for the shipment but, under a mistake, paid less than the tariff requirement.

In the Louisville vs. U. S. case it is therein stated that the general rule is that if a consignee accepts a shipment he becomes liable as a matter of law for the full amount of the freight charges. This case and the Fink case must be read in the light of the Louisville and Nashville R. R. Co. vs. Central Iron and Coal Co. case, which holds that liability only arises as a result of an agreement to pay, either expressedly or impliedly.

Judgment, therefore, will be entered in favor of the defendant, Wheaton Brass Works, and against the plaintiff, Southern Pacific Company.

Respectfully yours, Joseph G. Lyons, Judge.

JGL.F.

[fols. 2t-2u] NOTICE OF APPEAL

Notice is hereby given that the plaintiff Southern Pacific Company appeals to the Superior Court of New Jersey, Appellate Division, from the final judgment of the Essex County District Court entered in favor of the defendant in this action on March 10, 1950.

Dated: March 28, 1950.

Richard F. Green, Attorney for Plaintiff.

Service of a copy of the above Notice of Appeal is hereby acknowledged this 28th day of March, 1950.

Roy C. Collins, Attorney for Defendant.

(Here follows 1 Photolithograph, side folio 2v)

(Uniform Domestic Straight Bill of Lading, adopted by Official, Southern, Western and Illinois Classification Territories, March 15, as amended August 1, 1930, and June 15, 1941.)

1st SHEET

# UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—NOT NEGOTIABLE

Shipper's No. 27990

NO CAR ORDERED
NO CAR FURNISHED
CT

Agent's No.

VENTURA COUNTY RAILWAY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

at PORT HUENEME, CALIFORNIA 28 MAY 1947

from OFFICER IN CHARGE, ABD, CONSTR BATT CENTER

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to THE WEATON BRASS WORKS (Mail or street address of consignee—For purposes of notification only.)

Destination NEWARK State of NEW JERSEY County of

Route WC SP LOS ANGELES UP CNW NYC

Delivering Carrier Car Initial SOU Car No. 22423

| No. Packages | DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS | *WEIGHT (Subject to Correction) | CLASS OR RATE | CHECK COLUMN |
|---|---|---|---|---|
| 291 BXS | PIPE FITTINGS, NOIBN, I/S (LOADING ASSEMBLY) CU FT 2037 | 71,305 | | |

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make

PAGES BOND VERTICAL

NOT CAR FURNISHED

# VENTURA COUNTY RAILWAY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

at PORT HUENEME, CALIFORNIA 28 MAY 1947

from OFFICER IN CHARGE, ABD, CONSTR BATT CENTER

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to THE WEATON BRASS WORKS

Destination NEWARK State of NEW JERSEY County of

Route VC SP LOS ANGELES UP CNW NYC

Delivering Carrier Car Initial SOU Car No. 22423

| No. Packages | DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS | *WEIGHT (Subject to Correction) | CLASS OR RATE | CHECK COLUMN |
|---|---|---|---|---|
| | CU FT | | | |
| 291 BXS | PIPE FITTINGS, NOIBN, I/S 2037<br>(LOADING ASSEMBLY) | 71,305 | | |
| | INVOICE #'S<br>118848----5406232<br>118859----5406225<br>118860----5406226<br>118862----5406228<br>118863----5406229<br>118861----5406227<br>118864----5406230<br>"ODT GENERAL ORDER 18A COMPLIED WITH" | | | |

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. OINC, ABD, CBC, B.W. FINK CAPT., (CEC)USN

(Signature of Consignor.)

If ~~BY DIRECTION~~ prepaid, write or stamp here, "To be Prepaid."

"COLLECT"

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$_____

The requirements of General Order O.D.T. 18 have been complied with in the loading of this shipment, except as authorized by:

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

OINC, ABD, CONSTR BATT CENTER
B. W. FINK, CAPT., (CEC)USN Shipper.

Per BY DIRECTION

Agent

Per

Permanent Postoffice address of shipper

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

2V

PAGES BOND VERTICAL

## Contract Terms and Conditions

[fols. 2w-3] Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate

destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of

lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

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[fol. 4] SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM 1950

No. A 43

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a Corporation of the State of New Jersey, Defendant-Respondent

OPINION—December 4, 1950

Argued November 20, 1950 Decided ——

On Appeal from the Essex County District Court

Mr. Richard F. Green argued the cause for the appellant.
Mr. Roy C. Collins argued the cause for the respondent.

The opinion of the court was delivered by
BURLING, J.

This is an appeal by the plaintiff from a judgment of the Essex County District Court in favor of the defendant. The case was submitted to the District Court upon the pleadings and an agreed state of facts and briefs. The notice of appeal is addressed to the Superior Court, Appellate Division, but has been certified on our own motion.

The only issue involved is one of law. The question to be determined is whether a common carrier may, under the Interstate Commerce Act, recover from a consignee the balance of the freight charges on an interstate shipment where the consignor misdescribed the goods in a bill of lading and prepaid the freight at a lower rate than that provided in the filed tariffs for the goods actually shipped, the consignee having refused to accept the shipment until [fol. 5] assured that the freight was prepaid, and having changed his position in reliance on such representation.

The pertinent facts, as they appear in the stipulation of the parties, are that on May 16, 1947, the defendant entered

into a contract with Bernard Pipe Supply, of Los Angeles, California, for the purchase of 291 boxes of loading assemblies, by the terms of which contract the seller was to prepay the shipping charges. On or about June 1, 1947, the Officer in Charge, Construction Battalion Center, Port Hueneme, California, as agent of the seller, delivered the said assemblies to the plaintiff's agent at Oxnard, California, for shipment to the defendant, at Newark, New Jersey. The assemblies were described in the bill of lading as "291 BXS Pipe Fittings, NCIBN, I/S". The abbreviation "I/S" is accepted among carriers as meaning "Iron and Steel". The shipment actually consisted of iron and steel pipe with fittings and brass valves. The shipper's agent prepaid the plaintiff's agent charges of $1082.42 on the basis of tariffs and schedules of the Interstate Commerce Commission applicable to shipments of iron and steel. The defendant received from the seller an invoice for the price of the goods which indicated that the shipping charges had been prepaid. Enclosed with the invoice was a uniform straight bill of lading indicating that the freight charges were to be collected from the consignee. The defendant also received a notice from the Pennsylvania Railroad Co., the terminal carrier, indicating that the goods had arrived at its Newark freight station and that the freight charges had been prepaid. In view of the conflicting statements on the invoice, the arrival notice and the bill of lading the defendant contacted the Pennsylvania Railroad Co., advising that it did not wish to accept the goods until it knew whether [fol. 6] there were any shipping charges payable and being informed that the shipping charges had been fully prepaid accepted the goods and paid the shipper the full contract price therefor. At the time of such acceptance the defendant knew that the shipment consisted partly of brass but did not know the meaning of the abbreviation "I/S" on the bill of lading. Approximately 18 months after the acceptance of delivery by the defendant, and after substantially all of the goods had been resold, a representative of the Pennsylvania Railroad Co. discussed the shipment with the defendant, and, upon being apprised of the nature of the goods, informed the defendant that the goods had been improperly classified by the shipper as a result of which additional freight charges were due. The defendant informed said representative that any unpaid freight charges

would have to be collected by the railroad from the shipper as under the defendant's contract with the shipper the latter was liable therefor. The plaintiff has made no effort to collect the unpaid balance of the shipping charges from the shipper, which is still in business and solvent, but instituted the present suit on June 16, 1949, against the defendant to collect such unpaid charges in the amount of $738.37. The Essex County District Court decided that under the foregoing facts the defendant was under no liability to the plaintiff and judgment in favor of the defendant was accordingly entered on March 10, 1950. The present appeal is from that judgment.

The shipment giving rise to the present controversy is of an interstate nature and a determination of the question involved requires a consideration of the applicable provisions of the Interstate Commerce Act as construed by the Federal courts whose decisions on federal problems are controlling. The pertinent provisions of the Interstate Commerce Act are contained in Title 49, U. S. C. A., sec. 6, [fol. 7] par. (7) (Act Feb. 7, 1887, c. 104, sec. 6, par. 4, 24 Stat. 381, as amended Act March 2, 1889, c. 382, sec. 1, pars. 4, 7, 25 Stat. 856, 857, Act June 29, 1906, c. 3591, sec. 2, sec. 6, par. 6, 34 Stat. 587, Act Feb. 28, 1920, c. 91, sec. 411, sec. 6, par. 6, 41 Stat. 483) as follows:

> "No carrier . . . shall engage . . . in the transportation of property . . . unless the rates . . . and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of . . . property . . . between the points named in such tariffs than the rates . . . and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates . . . and charges so specified . . . ".

The foregoing section of the Act has been construed on numerous occasions by the federal courts and it has become well settled that the purpose of the Act is to prevent preferences and to enforce compliance with the requirements of the pertinent paragraph that a carrier shall not charge

less than the rates specified in his filed schedules, and that it is the right and duty of the carrier to collect the full tariff charges for freight delivered. Nor can any act or omission on the part of the carrier, except the running of the statute of limitations, estop or preclude the carrier from recovering the full amount of the proper charges from a person liable therefor, the parties to the consignment being, as a matter of law, charged with the proper schedule rates. See annotation, Title 49, U. S. C. A. sec. 6, par. (7), p. 284. One of the objectives of the Act is to prevent discrimination by carriers in their rates in favor of preferred shippers and to stabilize rates beyond the control of the carrier and the persons liable therefor. Failure by a carrier to collect the proper charges cannot release [fol. 8] a person liable therefor as this would circumvent the purpose of the Act and be in defiance of its provision forbidding a remission "in any manner or by any device any portion of the rates . . . and charges so specified." The application of the Act, as construed by the courts, leads occasionally to a seemingly harsh result as is alluded to in *Pittsburgh, C. C. & St. L.R. Co.* v. *Fink*, 250 U. S. 577, 63 L. ed. 1151 (1919), a leading case on the subject. In that case, a carrier delivered merchandise to the consignee, one Fink, upon payment by the latter of the sum of $15., being the amount specified in the waybill. The filed tariff rates so classified the merchandise that the charges should have been $30. Suit was instituted by the carrier for the difference and recovery was allowed. The rule was stated by Mr. Justice Day as follows:

> ". . . The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances, consistently with the provisions of the Interstate Commerce Act, the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as re-

quired by the statute. For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate. Texas & P.R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. This may be in the present as well as some other cases a hardship upon the consignee, due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute [fol. 9] in order to secure un-formity in charges for transportation."

It was further decided in the *Fink* case that the defendant could not invoke the principle of estoppel against the carrier's right to collect the legal rate as "Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute." In *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249, 90 L. ed. 47, 52 (1945), in referring to the doctrine of estoppel, Mr. Chief Justice Stone cited the *Fink* case and said:

> "For no more than private contract can estoppel be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest."

The principle fixing the liability of the consignee, as established in the *Fink* case, *supra*, has been followed by numerous federal and state courts, including the courts of this state. Some of the many federal cases following the established rule are *Louisville & N.R. Co.*, v. *Central Iron & Coal Co.*, 265 U. S. 59, 68 L. ed. 900 (1924); *Illinois Steel Co.* v *Baltimore & Ohio R. Co.* 320 U. S. 508, 88 L. ed. 259 (1944); *Central Warehouse Co.* v. *Chicago, R.I. & P. Ry. Co.*, 14 F. 2d 123 (D. C. Minn.) aff'd. 20 F. 2d 828 (C. A. 8th Circuit 1927); *F. Burkhart Mfg. Co.* v. *Fort Worth & D.C. Ry. Co.*, 149 F. 2d 909 (C. C. A. 8th Circuit 1945); *Great Northern Ry. Co.* v. *Hyder*, 279 F. 783, (D. C. W. D. Wash. S. D., 1922); *Western & Atlantic R. Co.* v. *Under-*

*wood* 281 F. 891 (D. C. N. D. Ga. 1922). The cases in New Jersey following the principle so established are *West Jersey etc. Co.* v. *Lake & Risley Co.*, 105 N. J. L. 314 (Sup. Ct. 1929); *Atlantic City R.R. Co.* v. *Packman*, 7 N. J. Misc. 945 (Sup. Ct. 1929); *N.Y. Central R.R. Co.* v. *Stanziale*, 105 N. J. L. 593 (E & A 1929). See also *New York, N.H. & H.R. Co.* v. *Lord & Spencer, Inc.*, 273 Mass. 583, 174 N. E. [fol. 10] 179 (Sup. Jud. Ct. 1931); 13 C. J. S., Carriers, sec. 393, p. 873; 9 Am. Jur. Carriers, sec. 624, p. 794; 83 A. L. R. 249. The rule was recognized in *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 83 L. ed. 953, 957 (1939), rehearing denied, where the court gave expression to a reason for the seemingly harsh rule by saying:

> ". . . This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collecting of less than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be reviewed with the same disapproval as voluntary rebates."

The defendant contends that its liability must be predicated on a contract to pay the shipping charges and that since in the present case the defendant consignee had informed the carrier, prior to acceptance of the goods by the defendant, that the shipping charges were to be paid by the shipper and that it, the defendant consignee, would not assume liability therefor there was no contract by the defendant to pay the charges and hence no liability on its part. It is said that while in the *Fink* case, *supra*, the consignee paid less than the proper charges at the time the goods were delivered, the defendant herein refused to accept delivery until assured that all charges had been prepaid. But this would seem to be immaterial in view of the rule as stated in the *Fink* case, *supra*, and so often followed by the courts, as earlier indicated herein. In *Great Northern Ry. Co.* v. *Hyder*, *supra*, the following question was presented for determination: "Can a consignee, who is not at any time the owner of the goods shipped, who has not agreed with either the shipper or the carrier that he will pay the freight, who accepts the goods upon the carrier's representation that the freight has been prepaid,

be bound by such acceptance to pay the freight?" The Court answered the question in the affirmative, saying:

> [fol. 11] ". . . If the doctrine of estoppel cannot be invoked where the consignee paid the demanded rate, thinking it was the filed and posted rate, the carrier thereby losing its lien for the unpaid portion of the freight, it is not perceived why the consignee, in receiving the goods, acting under a mistaken belief that the shipper had fully paid the freight, can do so . . ."

and further saying:

> ". . . The shipper, the carrier, and the consignee are all agents and trustees for the public, and no complications arising out of the agreements between them, or shuffling, should defeat the purpose of the act requiring the full and exact payment of the freight as fixed by the filed, posted and published tariff."

A similar result was reached in *Western & Atlantic R. Co.* v. *Underwood supra,* wherein the court used the following cogent language:

> ". . . That the consignee cannot accept delivery without incurring liability for the carrier's charges, known or unknown, supposed to be prepaid or otherwise, and no matter what the consignee's actual relation to the shipper is, appears a harsh rule, but is seemingly established by authority. If by the shipper's omission the consignee is thus made liable for a charge which as between him and the shipper should not be borne by him his recourse is on the shipper. The carrier is not bound by their private rights in the transaction, whether known or unknown to it, nor by any mistake or misrepresentation occurring, but under the law may look to the shipper as the original contractor to pay and to the person who as consignee accepts the goods and becomes by statute liable to discharge the lien thereon until the lawful charges are satisfied."

The defendant seeks support for its position in the cases of *Louisville & N.R. Co.* v. *Central Iron & Coal Co. supra, Central R.R. Co.* v. *MacCartney,* 68 N.J.L. 165 (Sup. Ct. 1902) and *Penna. R.R. Co.* v. *Townsend,* 90 N.J.L. 75 (Sup. Ct. 1917). The two New Jersey cases are not help-

ful to the defendant. Our former Supreme Court, in 1929, in *West Jersey etc. Co.* v. *Lake & Risley Co., supra,* followed the rule of the *Fink* case, and referred specifically to the *MacCartney* and *Townsend* cases as follows:

> [fol. 12] "The cases cited were, however, dealing solely with the common law liability and none other. There is no reference to any statutory authority, nor, so far as appears, was the act of Congress called to the court's attention. Plaintiff in the present cases bases its right to recover not on the common law but on the act of Congress of February 4th, 1887, known as the Interstate Commerce Act, and its amendments. The question before us is, therefore, a federal and not a state problem, and is controlled by the decisions of the federal courts which as we think have ruled adversely to the respondent's contention."

We find nothing in *Louisville & N.R. Co.* v. *Central Iron & Coal Co., supra,* to support the defendant's position. That case involved a suit by the carrier against the shipper for the difference between the amount of charges originally incorrectly computed and paid by the consignee and the proper amount which was legally payable. The bill of lading in that case, as here, stated that the charges should be paid by the consignee. The court considered the bill of lading as the contract and decided that the *shipper* was not liable and that action should have been brought against the consignee. Mr. Justice Brandeis, speaking for the court, said that the Interstate Commerce Act did not impose an absolute obligation upon a *shipper* to pay the freight charges, and that the carrier and *shipper* "were left free to contract, subject to the rule which prohibits discrimination." But in concluding his opinion, Mr. Justice Brandeis said:

> "For, under the rule of the Fink case, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act."

The rule of the foregoing case appears to be that while the shipper has some latitude in limiting his liability by his

contractual undertaking, "if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full [fols. 13-14] amount of the freight charges." The *Central Iron & Coal Co.* case has been subsequently construed by the federal courts to impose an absolute liability on the consignee resulting from the acceptance of the goods. *Central Warehouse Co.* v. *Chicago, R.I. & P. Ry Co.* (C.C.A. 8th Circuit 1927) *supra; F. Burkhart Mfg. Co.* v. *Fort Worth & D.C. Ry Co.,* (C.C.A. 8th Circuit 1945), *supra.*

The judgment is reversed and the trial court is directed to enter judgment for the plaintiff in the amount of its claim, together with lawful interest thereon from the date of acceptance of delivery.

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[fol. 15] SUPREME COURT OF NEW JERSEY

Check List

No. A-43

September Term, 1950

On appeal from Essex County District Court.

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

and

WHEATON BRASS WORKS, Defendant-Respondent.

Decided December 4, 1950.

The Chief Justice presiding.

Opinion by Burling, J.

| CHECK LIST | Affirm | Reverse | Modify | Concur in Result |
|---|---|---|---|---|
| The Chief Justice..... | 1 | | | |
| Mr. Justice Case ..... | | 1 | | |
| Mr. Justice Heher ..... | | 1 | | |
| Mr. Justice Oliphant ..... | | 1 | | |
| Mr. Justice Wachenfeld .. | 1 | | | |
| Mr. Justice Burling ..... | | 1 | | |
| Mr. Justice Ackerson ..... | | 1 | | |
| Totals..... | 2 | 5 | | |

[fo'. 16] SUPREME COURT OF NEW JERSEY

Appeal Docket No. 666

SOUTHERN PACIFIC COMPANY, Plaintiff-Appellant,

vs.

WHEATON BRASS WORKS, a corporation of the State of New Jersey, Defendant-Respondent.

Civil Action On Appeal

Mandate on Reversal—Dec. 4, 1950

This cause having been duly argued before this Court by Mr. Richard F. Green, counsel for the appellant and Mr. Roy C. Collins, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Essex County District Court is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Essex County District Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 4th day of December, 1950.

Filed Dec. 4, 1950, Charles K. Barton, Clerk.

Charles K. Barton, Clerk of the Supreme Court

A true copy, Charles K. Barton, Clerk.

[fol. 17] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 18] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1950

[Title omitted]

STIPULATION AS TO PRINTING

The parties to the above-entitled cause hereby stipulate that there shall be deleted from the record to be printed by the Clerk of the Supreme Court of the United States, all of the printed material set forth on a photostatic copy of the back or reverse side of the bill of lading and a printed facsimile thereof, both of which are entitled "Contract Terms and Conditions", and which appear opposite page 10a in the Brief and Appendix for Appellant in the court below, except that portion of Section 7 thereof which reads as follows:

> "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property;. . . . The consignor shall be liable for the freight and all other lawful charges except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, [fol. 19] contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. . . . If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Roy C. Collins, Counsel for Petitioner; Richard F. Green, Counsel for Respondent.

Dated: February 14, 1951.